THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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May 23, 1975

The Honorable William T. "Bill" Moore
Chairman, Senate Committee on State Affairs
State Senate
Austin, Texas 78711

Honorable D. R. "Tom" Uher
Chairman, House Committee on State Affairs
House of Representatives
P. O. Box 2910
Austin, Texas 78711

Letter Advisory No. 107

Re: Constitutionality of Senate Bill 136 and House Bills 663 and 664

Gentlemen:

You have requested our opinion regarding the constitutionality of Senate Bill 136 and House Bill 663, both of which would create a Texas Housing Finance Agency, and House Bill 664, which would establish a Neighborhood Preservation Loan Fund within the State Department of Community Affairs. As to these first two bills, you ask specifically:

1. Whether implementation of the housing sponsor (section 9) and mortgage lender (section 11) financing programs of the Texas Housing Finance Agency Act would constitute a permissible use of state money or appropriations under article 3, section 51, and article 16, section 6 of the Texas Constitution.

2. Whether bonds issued under the Act and payable from the revenues, income, or other resources of the Agency would constitute a debt created by or on behalf of the State or a lending or pledge of the State's credit under article 3, sections 49 and 50 of the Texas Constitution.

> 3. Whether the declaration of section 30 of the Act creates a legal obligation or a legally enforceable moral obligation on the part of future legislatures and whether such obligations are constitutionally permissible.
>
> 4. Whether the Legislature may constitutionally appropriate money from the general revenue fund for the purpose of preventing depletion of a Reserve Fund created for bonds issued solely pursuant to statutory authority.

Although Chairman Uher asks no specific questions with regard to House Bill 664, the first question relating to the Texas Housing Finance Agency is relevant to the consideration of legislation creating the Neighborhood Preservation Loan Fund.

According to the bill analysis accompanying Senate Bill 136, Section 9 authorizes the Texas Housing Finance Agency "(a) [to] make mortgage loans to housing sponsors to finance the purchase, construction, or remodelling of housing developments for persons and families of low income, (b) to make regulations respecting such loans, (c) to contract with housing sponsors and mortgage lenders with respect to such loans, (d) to institute actions to enforce this Act or any agreement under its provisions." Section 11 authorizes the Agency "to purchase and sell notes and mortgages." You have expressed concern that these features of the Act might violate the following constitutional provisions:

> Article 3, section 51. The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever. . .
>
> Article 16, section 6. (a) No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. . .

The constitutional prohibition against the granting of public funds to individuals and groups was

> . . . designed to prevent the giving away of public funds and not to deny the Legislature the use of state funds for governmental purposes. State v. City of Dallas, 319 S. W. 2d 767, 775 (Tex. Civ. App. -- Austin 1958), aff'd sub nom. State v. City of Austin, 331 S. W. 2d 737 (Tex. Sup. 1960).

Even though a "privately owned buiness may be benefited," an expenditure is not thereby rendered unlawful, so long as it is made "for the direct accomplishment of a legitimate public purpose." Barrington v. Cokinos, 338 S. W. 2d 133, 140 (Tex. Sup. 1960).

Both bills creating the Texas Housing Finance Agency declare in section 4 the purposes of the Agency and set forth the findings of the Legislature with respect to the public need for such an agency. Section 4(d) then states:

> The Legislature finds that all of the purposes stated in this section are public purposes for which public money may be borrowed, expended, advanced, loaned, or granted.

Although the determination of what constitutes a public use or a public purpose is ultimately a judicial question, great weight should be accorded legislative policy declarations in such matters. Davis v. City of Lubbock, 326 S. W. 2d 699 (Tex. Sup. 1959). See also State ex rel. Hammermill Paper Co. v. La Plante, 205 N. W. 2d 784, 795 (Wis. Sup. 1973); Wilmington Parking Authority v. Ranken, 105 A. 2d 614, 620 (Del Sup. 1954).

In State v. City of Austin, supra, the Supreme Court upheld the constitutionality of article 6674w-4, V. T. C. S., which provides for reimbursement to utility companies for the cost of relocating facilities whose move is necessitated by highway construction. The Court made clear that, although the Legislature could have required the companies to bear their own relocation costs, such fact alone was not sufficient to violate the prohibition of article 3, section 51, "provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious. Id., at 743. The Legislature has "considerable discretion in determining" what constitutes a public purpose, and "[i]f there is room for a fair difference of opinion as to the necessity for and the reasonableness of an enactment which lies within the domain of the police power, the courts will not hold it void." Id.

In Harris County v. Dowlearn, 489 S. W. 2d 140 (Tex. Civ. App. -- Houston 1972, writ ref'd n. r. e.), the court upheld the constitutionality of the Tort Claims Act against the contention that it contravened article 3, section 51 and article 16, section 6:

> It is for the Legislature to determine whether to equalize the burden of victims injured by the negligence of state employees by reimbursing such individuals from state funds with certain limitations. While the Legislature has no right to appropriate money as a mere charity or gratuity, the problem of torts committed by officers, agents, and employees of the government is one of concern to all people of this State. The enactment of the Tort Claims Act, we think, clearly and necessarily promotes the general welfare of this State. Id., at 144-45.

In our opinion, the courts of Texas would probably uphold sections 9 and 11 of Senate Bill 136 and House Bill 663 on the basis of similar reasoning. It is noteworthy that the highest courts of five other states have, in recent years, sustained the constitutional validty of housing finance legislation. See Maine State Housing Authority v. Depositors Trust Co., 278 A. 2d 699 (Me. Sup. 1971); Martin v. North Carolina Housing Corp., 175 S.E. 2d 665 (No. Car. Sup. 1970); Massachusetts Housing Finance Agency v. New England Merchants National Bank of Boston, 249 N. E. 2d 599 (Mass. Sup. 1969); State ex rel. West Virginia Housing Development Fund v. Copenhaver, 171 S. E. 2d 545 (W. Va. Sup. 1969); In re Advisory Opinion, 158 N. W. 2d 416 (Mich. Sup. 1968). These decisions, the clear trend of the Texas cases, and the language of the bills declaring the public purpose of the legislation would seem to establish the probable constitutionality of sections 9 and 11 of the Act.

You also ask whether the issuance of bonds which are payable from the revenues, income, or other resources of the Housing Finance Agency would contravene article 3, sections 49 and 50 of the Texas Constitution, which provide:

> Section 49. No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars.

> Section 50. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

In Texas Turnpike Authority v. Sheppard, 279 S. W. 2d 302, (Tex. Sup. 1955), the Supreme Court upheld the constitutionality of the Turnpike Projects Act, article 6674v, V. T. C. S., against the contention that the bonds issued thereunder constituted a debt of the state in violation of article 3, section 49 of the Texas Constitution. Section 11 of article 6674v had authorized a bondholders' lien on "the tolls and other revenues to be received" by the Turnpike Authority, just as section 20 of the Housing Finance Agency Act provides that the Agency may secure its revenue bonds "by a first or subordinate lien on and pledge of all or any part of the revenues, income, or other resources of the agency." Despite its recognition of the validity of such liens, however, the Court was persuaded by the limiting language of section 2 of the Turnpike Projects Act, which provided that "[t]urnpike revenue bonds issued under the provisions of this Act shall not be deemed to constitute a debt of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any political subdivision. . . ." The Court declared:

> The Act specifically provides that the bonds issued shall not be deemed to constitute a debt of the State or of any political subdivision or the pledging of the faith and credit of the State or of any such political subdivision but shall be payable solely from the fund derived from revenues. Language could not make clearer the intention of the Legislature that the obligations should never in any manner become a debt due and owing by the State of Texas. Texas Turnpike Authority, supra, at 305.

The analogy to the Housing Finance Agency Act is clear. Section 21 of both bills provide that:

> (a) The agency's bonds are obligations of the agency and are payable solely from funds of the agency. The agency's bonds are not and do not create or constitute an obligation, a debt, or a liability of the State of Texas, or create or constitute a pledge, giving, or lending of the faith or credit or taxing power of the State of Texas.
>
> (b) On the face of each bond of the agency shall appear a statement that the State of Texas is not obligated to pay the principal or interest, and that neither the faith or credit nor the taxing power of the State of Texas is pledged, given, or loaned.

It is our opinion that, on the basis of the Supreme Court's holding in Texas Turnpike Authority v. Sheppard, supra, neither of the bills would be deemed to contravene the provisions of article 3, sections 49 and 50 of the Texas Constitution.

Your third question inquires about the effect of Section 30 of Senate Bill 136, which is the only portion of the Housing Finance Agency Act which is not included in House Bill 663. Section 30 declares it to be:

> the policy of the State of Texas that each subsequent Legislature appropriate to the Agency, out of the General Revenue Fund in the Treasury of the State of Texas, to be deposited by the Agency to the credit of the Reserve Fund, or the appropriate account therein, such sums of money, if any, as are necessary from time to time to restore the amount of each such depletion of the Reserve Fund, or any account therein.

We believe it is clear that this legislative policy declaration cannot operate to commit future legislatures to supply deficiencies in the Reserve Fund. Since a future legislature might even repeal the whole of the Housing Finance Agency Act, subject only to the constitutional rights of bondholders, it may surely refuse to appropriate any amount to the Reserve Fund:

> The rules are settled that the power of the Legislature to enact laws within constitutional limitations is a continuing one; that the exercise of the power once does not exhaust it; and that what one Legislature can establish by enactment, another can alter or abolish, except to the extent that rights of property acquired by private persons may limit the power. James v. Gulf Insurance Co., 179 S.W.2d 397, 409 (Tex. Civ. App. -- Austin 1944), rev'd on other grounds, 185 S.W. 2d 966 (Tex. Sup. 1945).

Even if the declaration of section 30 is viewed as a "moral obligation," the present legislature is without authority to bind a subsequent legislature "by the enactment of a law that cannot be altered or repealed by the latter," Bryant v. State, 457 S. W. 2d 72, 78 (Tex. Civ. App. -- Eastland 1970, no writ), since "a mere moral obligation of the state" without legal sanction "will not support an appropriation by the Legislature of state money" [State v. Perlstein, 79 S. W. 2d 143, 147 (Tex. Civ. App. -- Austin 1934, writ dism'd)]. It is therefore our opinion that the courts of Texas would hold that section 30 of the Housing Finance Agency Act creates neither a legal obligation nor a legally enforceable moral obligation on the part of future legislatures.

Finally, you ask whether future legislatures may appropriate money from the general revenue fund for the purpose of preventing depletion of the Reserve Fund. Article 3, section 44 of the Texas Constitution provides, in pertinent part:

> The Legislature. . . shall not. . . grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law. . .

The courts have:

> interpre[ed] this to mean that the Legislature cannot appropriate state money to "any individual" unless, at the very time the appropriation is made, there is already in force some valid law constituting the claim the appropriation is made to pay a legal and valid obligation of the state. By legal obligation is meant such an obligation as would form the basis of a judgment against the state in a court of competent jurisdiction in the event it should permit itself to be sued. Austin National Bank v. Sheppard, 71 S. W. 2d 242, 245 (Tex. Comm. App., 1934, opinion adopted).

Section 21 of both bills specifically declares that the Agency's bonds do not constitute a legal obligation of the State of Texas. Although the application of Austin National Bank and Pearlstein in this situation is far from settled, given the broad language of those cases, it is our opinion that any future legislature would be prohibited by the provisions of article 3, section 44, of the Texas Constitution, from appropriating any sum from the

general revenue fund for the purpose of preventing the depletion of the Reserve Fund. See also State v. Pearlstein, supra; contra, Massachusetts Housing Finance Agency v. New England Merchants National Bank of Boston, supra, at 609-10. Maine State Housing Authority v. Depositors Trust Co., supra, at 709.

With regard to House Bill 664, which would create a Neighborhood Preservation Loan Fund within the State Department of Community Affairs, we will first address the bill's constitutionality under article 3, section 51, and article 16, section 6, of the Texas Constitution. Section 10 of House Bill 664 authorizes the Department to use the Fund "to make . . . housing rehabilitation loans. . . to persons and families of low income who would otherwise be unable to finance on reasonable terms the sum total of all rehabilitation costs approved by the Department to place the residential housing in sound condition." Section 11 permits the Department to purchase and sell notes and mortgages.

Section 1 of House Bill 664 declares the uses and purposes of the Fund, and states that all such uses and purposes:

> are public uses and purposes for which public money may be borrowed, expended, advanced, loaned, or granted; and that such activities serve a public purpose in improving or otherwise benefiting the people of this State; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

We believe that the declared public purposes of House Bill 664, together with the cases relied upon in our analysis of the Housing Finance Agency Act, supra, indicate that the courts of Texas would probably uphold the constitutionality of House Bill 664 against the contention that its implementation would constitute an impermissible use of state money or appropriations in contravention of article 3, section 51, and article 16, section 6 of the Texas Constitution.

House Bill 664, in contrast to the revenue bond financing technique envisioned by the Housing Finance Agency Act, contemplates the use of public funds to finance the Neighborhood Preservation Loan Fund. Since the bill makes no provision for any lien upon the revenue or property of the

Department or upon the Neighborhood Preservation Loan Fund, it is our opinion that the financing features of House Bill 664 raise no problems under article 3, sections 49 and 50 of the Texas Constitution. As a result, we believe that the courts would sustain the constitutional validity of House Bill 664.

Very truly yours,

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APPROVED:

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